

**DISSENTING STATEMENT OF  
COMMISSIONER MICHAEL O'RIELLY**

Re: *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375.

I dissent from this order because the Commission has not adequately considered objections by Securus Technologies, Inc., Global Tel\*Link Corporation, and Telmate, LLC regarding the release of confidential data, including commercially sensitive cost data, to counsel for their competitor, Pay Tel Communications, Inc. On a larger scale, this item is interlinked to the current Commission's sometimes inattentive approach to the sensitivities surrounding critical information provided to the Commission by outside parties.

As an initial matter, the order claims that the objections are untimely because the companies should have challenged the underlying protective order. However, protective orders are adopted without notice and comment and, until recently, the Commission did not have specific procedures for challenging the terms of protective orders. Moreover, parties may not reasonably know whether they will have objections until they receive a specific request. How the general terms of a protective order will apply in a given situation may not be obvious until it happens. Presumably, that is why protective orders include provisions allowing parties to object to particular persons reviewing the protected information.

That is exactly what happened here. While the companies did not oppose providing access to Pay Tel's outside consultant, and may not have objected to requests from competitors that employ both in-house and outside counsel, they did object to review by Pay Tel's counsel based on Pay Tel's particular circumstances. Specifically, they argue that Pay Tel's outside counsel explicitly or effectively serves as its in-house counsel, meaning that there isn't the customary separation between the company and the lawyers that will review the protected information. Moreover, because of this arrangement, they argue that Pay Tel's counsel is, at the very least, closer to "Competitive Decision-Making" than an outside counsel normally would be. Especially in this proceeding, where it is argued that nearly every filing, Commission holding, and court decision has the potential to alter the competitive landscape and even put providers out of business, this seems like a credible concern, without making any comment on the professionalism of the individuals at the heart of the matter.

The order acknowledges that the purpose of the objection process is to challenge whether someone is eligible to access information under the protective order. But then the Commission should take these challenges seriously, including by looking behind the Acknowledgements of Confidentiality, where necessary, to be assured that review by certain entities is not just facially compliant but substantively appropriate. Once the information is disclosed it cannot be unremembered. Like in other instances, the bell cannot be unrung.

Furthermore, since Pay Tel's outside consultant has access, the companies argue that Pay Tel is able to meaningfully participate in the proceeding, just as it has done in the past.<sup>1</sup> Accordingly, they state that any additional benefit of providing access to counsel is outweighed by the substantial and irreversible competitive harm that would occur if the confidential data were disclosed even inadvertently.

The order responds that, having already balanced the concerns of parties submitting information against the interest of the public in accessing that information by adopting a protective order, the Commission does not need to revisit that balance if specific objections are raised. In other words, the

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<sup>1</sup> In fact, one company asserts that there was no reason to think that they would receive a request from counsel because an outside consultant – the same economist employed by Pay Tel in this latest proceeding – previously handled and reviewed confidential cost data on behalf of a number of providers.

expectation is that the Commission foresaw every possible concern and adopted a foolproof protective order. I disagree with that mindset. The Commission should be open to rebalancing the interests when subsequent developments call into question whether the Commission reached the right result. Given that Pay Tel's outside consultant already has access to the information, and the companies have made credible arguments as to why Pay Tel's outside counsel should not review it, the Commission should have taken the next step to consider whether the benefits continue to outweigh the costs.